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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

ORVILLE GOLDEN, *Petitioner*,
vs.
STATE OF MISSOURI, *Respondent*.

No. 919

RESPONDENT'S ANSWER AND SUGGESTIONS IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI.

J. E. TAYLOR,
Attorney General,
Frank W. Hayes
W. BRADY DUNCAN,
Assistant Attorney General,
Attorneys for Respondent.

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RESPONDENT'S ANSWER AND SUGGESTIONS IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Comes now the respondent, State of Missouri, and for its answer to Petition for Writ of Certiorari, filed herein, contends petitioner has not shown sufficient cause why Writ of Certiorari should be granted and respectfully submits and shows to this Honorable Court:

RESPONDENT'S ABSTRACT OF RECORD.

The record of this cause as set out by petitioner in his petition under the heading of STATEMENT OF MATTERS INVOLVED, is substantially correct and is not reprinted here.

RESPONDENT'S STATEMENT OF THE FACTS.

The evidence in this case discloses that the Hod Carriers Building and Common Laborers Local No. 42 (hereafter referred to as the "Local") with offices in St. Louis, Missouri, was duly chartered by the International Hod Carriers Building and Common Laborers Union of America (hereinafter referred to as the "International") with offices in Washington, D. C., on February 7, 1933. During the year of 1941, from January 1, to October 11, Orville Golden, the defendant in this case, was the duly elected and acting Financial Secretary and Treasurer of the Local. Paul Hulahan and Earl Jenkins were business agents, and Edward Hill was president of the organization. The Constitution and bylaws of the Local set out the duties of these officers, and particularly those of the financial secretary, among which he was charged with rendering a detailed written report showing all moneys received by him and from what sources, deposit all moneys with a banking institution approved by the Local, and make a written report showing financial transactions of the Local each month. The bylaws also provided for a Board of Trustees who were charged with the duty of auditing the books of the financial secretary and treasurer, quarterly. They were suppose to check the entry with the bank deposits, statements, and other various data or memorandums. During the period from January 1 to November 11, the Local took in a total of $289,476.35. The total disbursements of the Local in the same period were $54,089.35. The Local had an account in the Telegraphers National Bank (the bank in which the money was supposed to have been deposited) which showed a balance of $34,495.13. Applying

the cash on hand and the amount collected against the disbursements, there should have beeen a balance of $269,-882.12 in the Telegraphers National Bank on October 11, 1941. We shall show later that much of this money was held in cash, in deposit boxes, and in the personal possession of the different officers of the Local. When the authorities began to investigate, the various officers brought in (in cash and checks) enough money to bring the balance in the bank to $183,866.65, but there was still a balance of $86,015.28 unaccounted for.

The process by which a person became a member of the Local was that he would come in and register, at which time he would either pay his initiation fee or he would pay in installments each pay period thereafter, until he had paid the total amount, for which he would be given a receipt. When he registered, an index card was made on which there was a symbol indicating the type of work he was qualified for (sometimes there was no symbol and the testimony is that in such case, it was to be considered as a "Commercial"). The symbols were, "C" or "X", (meaning Commercial), "T.N.T.", and "R" (meaning Residential). The "C" represented the highest type of work and the initiation fee was $56.50. These workers were eligible to work at defense plants such as the Remington Small Arms Plant. The "T.N.T." workers paid $31.50 and worked only at the T.N.T. plant at Weldon Springs, Missouri. The Residential worker paid $21.50 and was eligible to work only on residences such as bungalows and cottages. After the man had completed paying the total amount owed the Union as indicated by the symbol on the index card, he was required to turn in the receipts which had been issued for his payments whereupon he would be issued what

is known as a "work card" (the work card was a card showing that he was in good standing and entitled him to work upon the job he had qualified for). On the last receipt his name, Social Security Number, age, and address would be placed and that information would be forwarded to the International. The International would then mail him a "book" which had a place to be stamped as the worker paid his dues.

About September 1, 1941, the appellant disappeared. He was not seen again in the Local offices until September 22. He explained that he had gotten drunk in a small town in Missouri, and ended up in New Mexico. On the morning of Monday, September 29, there was gathered in the headquarters at 36010A, Finney Avenue, St. Louis, Missouri, the following people: Orville Golden, June Shaw, Mrs. Loulla Jones (Mrs. Jones and Miss Shaw were female clerks) and Edward Hill. Between the hours of 10:00 A. M. and 12:00 noon, a man came into the office, introduced himself as "Mr. Bard" and stated that he was an internal revenue agent sent from Washington, D. C. He displayed a large silver colored badge. He read a list of names from a sheet of paper with their titles consisting of Edward Hill, President of the Local, Paul Hulahan and Edward Jenkins, Business agents, Orville Golden, financial secretary and treasurer, William Poster, secretary of Local No. 110, St. Louis County, and John Taylor, a business agent of Local No. 53, which is the Negro division of Local No. 42. This man demanded that all of the above named people be present at the Local office on September 30, at 10:00 A. M. for questioning. On Tuesday morning, September 30, Bard returned accompanied by a man who introduced himself as "R. Morton." All of the persons named

above were present and after representing themselves to be internal revenue inspectors, Bard said that they were sent by Washington to investigate job selling on defense jobs. They asked questions about several different jobs and then went into their financial affairs. Hill told the men that Golden did all the banking and Golden told them that he banked at the Telegraphers National Bank. He then told them about a safety deposit box at the Lindell Trust Co. The man called Bard then said it would be necessary to investigate that box. Then they told Golden to get his hat and coat and left. He told the rest of the people to stay where they were. They left at about 11:30 (Golden and the two so-called agents) and Golden returned by himself at 1:30. Then Golden told them he had gone to the Lindell Trust Company with a man and that they had taken some $11,000.00 out of the safety deposit box. The men then took this money to the Federal Building but they gave Golden a receipt for the money. Golden said he was instructed to tell the people to remain where they were until 2:30 when the money count would be finished. At 2:30 the telephone rang and Golden answered. He told those assembled that it was the agents and that they said it would take longer than they thought to count the money and for everybody to be present the next day at 10:00 A. M. Morton and Bard did not appear the next morning nor have they been seen or heard of since. On the failure of the psuedo agents to make their appearance, the attorney for the Local, one William H. Bartley, was asked to investigate. He took the purported receipt to the offices of the collector of internal revenue and he there found that this was not a receipt of the collector's office nor were there any such men employed by the office, nor

was it their practice to take money into their possession—in short, they exposed the whole thing as a fake. The collector's office advised the attorney to go to the F. B. I.

Two Federal Agents by the name of Hunt and Duffy were put in charge of this case. They went to the Lindell Trust Company on October 2, and examined the deposit box from which the money was taken for finger prints and attempted to identify the two impersonators. They got signed statements from Huluhan on October 2 and Golden on October 3 as to what happened on the day of the 30th of September. These men also found out about the other safety deposit boxes and checked the account at the Telegraphers Bank. When the defendant was asked why they put the money in the safety deposit boxes instead of placing it in the banking account, he said that it was the "custom" to let money accumulate in the safety deposit boxes before depositing. The F. B. I. men then got permission to search Golden and his premises. They found $115.00 of the Union funds in the dresser drawer of Golden's bedroom, $370.00 in a chicken feed barrel in the garage at his home (which Mrs. Golden contended was her private fund). In his pocket they found $350.00 in his billfold, and $1,815.00 in one-hundred dollar bills, except for the fifteen dollars, in his side pocket, which Golden stated was Union money which he was carrying on his person because he did not think it would be safe to leave it at the Union headquarters (it is interesting to note here that on the day the safe at the Union offices was opened, it contained some $11,000.00 and that Golden later testified that it was a custom to allow money to accumulate in that safe before taking it to the bank). The agents questioned

the ladies, Shaw and Jones, and counted the money at the safe which amounted to $10,138.20. Golden then disappeared again until the day of the 7th, when they found him at his home and he said he had been drunk and had a hangover. They then checked the box No. 78 at the Lindell Trust Company where they found $26,512.73. Golden told them that he had this money there because there had been no deposit since July, 1941. They then checked the accounts in the name of the Union at the Telegraphers Bank and found $56,170.85 in the general fund, and $11,205.68 in the death benefit fund. There were also two money bags which had been left there but not deposited, in which there was $1,087.18 in checks and $1,175.00 in cash. All the money so far collected and discovered was then put in the Telegraphers bank. On October 8, these agents obtained statements from Jenkins and Taylor as to the fake internal revenue agents. On the 9th they checked box No. 922 at the Lindell Trust Company, held in the joint names of Mr. and Mrs. Golden and found $800.00 in defense bonds, all purchased in July of 1941. On that day Golden put the $800.00 and the $113.00 discovered on his person, back in box No. 101. They then went to the F. B. I. offices where Golden was questioned further in the presence of his wife. During the questioning, Golden's wife spoke up and said, "Now Orville, if you have anything you want to tell these men, or if you are holding anything out, or if you or anybody else has anything or any money you are not entitled to, I want you to tell the truth about it." Thereupon, Golden asked that his wife leave and he made a second statement in which he confessed that he and the other officers had embezzled $6,000.00 from the Union. He signed a statement to that effect and

said that he was glad to get it off his chest. The local police were then called and Golden was arrested.

The method used in juggling the funds and the books was this: A man would come in and pay for a Commercial ($56.50) card and it would be entered on the books as a Residential ($21.50), the difference being the amount pocketed. In many cases there was no entry made in the cash journal whatsoever. Now the events showed that there was supposed to be a quarterly audit made by the Board of Trustees of the receipts and disbursements of the local. This was done in 1940 but not in 1941. When the trustees attempted to make the audit as they were supposed to, Golden told them that because of the increase in business, it would be necessary to get a "State Auditor" to make the audit. Late in June, the president, Hill, sent a postal card to one Otto H. Lenfersiech, asking him to come in, which he did on June 30, and he was hired by Hill and the appellant to make a statement of the receipts and disbursements of the Local. He was only given a cash journal and a disbursement journal upon which to make his statement. When he asked about the membership list he was told that there were 3,600 names and that it would take too long. No other information in the way of books or ledgers was given him. He made one audit being for the last of 1940 and the first of 1941. Golden informed him that the banking was done at the Telegraphers Bank and he was never told of the money in the Safety deposit boxes. According to his audit he found a cash balance of $67,282.28. After the arrest of the appellant and the other officers, one Theodore Nischintz, a representative of the International, took over and suspended all of the officers. On October 15, Huluhan turned over $11,000.00 to this man which was in

a black bag and Hill gave him four cigar boxes with about the same amount of money in them. He then employed the Jeff K. Stone and Company to make an audit of the books of the Union. The auditor, Blecker (of Jeff K. Stone and Co.), testified that he started counting money on October 11, 1941, in the presence of the attorneys, detectives, etc., and found in box No. 301, which was in Hill's name, individually, at the Lindell Trust Co., $39,700.75 in cash, and checks in the amount of $5,047.32. There was also a black bag marked "Hill Building and Laborers Local No. 42" which contained $2,116.05. Then they counted the money in box No. 104, which was carried in the name of the Local, and it contained $1,035.53. They next counted the contents of box No. 78, carried in the name of the Local, which contained $26,119.88. On the 15th they counted four manilla bags at the Telegraphers Bank which contained $10,882.61. There was another bag of a different kind which contained $2,576.18. He was also given a small paper box by Nischintz which contained $68.63 which was identified as "small change" lying loose at the office. The total counted and deposited in the bank was $116,904.15.

The audit further showed that the total collections from all sources by the Local from January 1 to June 30, 1941, was $112,290.25. For the same period the cash journal showed only $61,718.91. There were no initiations recorded from July 1 to October 11, but the cash journal showed collections of dues and death benefits in the amount of $23,574.56. The actual amount of money collected in initiations from January 1, 1941 to October 11, 1941 was $246,579.50; from dues $39,031.85; from fines $340.00, and $3,525.00 in death benefits. The bank account at the Telegraphers Bank on January 1, 1941; in these funds, was

$34,495.13. The disbursements during the same period were $54,089.35. The total receipts plus the cash on hand was $323,976.48. After deducting the disbursements from the above figure, there should have been a total of $269,-882.13. When the audit started in October of 1941, there was $66,948.70 in the Telegraphers Bank and there was brought in from different sources, as stated above, $116,-918.50. This made a total of $183,866.85. Subtracting this from $269,882.13, which is the amount they should have had, leaves a balance unaccounted for of $86,013.28.

The biggest part of the bookkeeping and entries in the cash journal was made by the appellant. From April 28, 1941 to June 30, 1941, the receipt stubs showed $2,384.10, but Golden only listed $715.00 in the cash journal, a difference of $1,669.10, which the record shows was handled altogether by Golden in this period, unaccounted for.

The total initiations from January 1 to October 11, as shown by Golden's record, was 1,765, but the actual number was 3,839, as shown by the audit. On July 23, 1941, there was 130 initiations, but none of these were recorded either in the cash journal or the membership list, that is, no collections nor names were entered but there were 130 *blank lines* in the journal between July 19 and July 21, which the witeness Jones testified that Golden told her to leave. Breaking the evidence down further, the audit showed that between January 1, 1941 and June 30, 1941, there was $112,290.25 collected, which, added to the amount in the bank on January 1, would make a total of $146,785.38. The actual amount in the bank on June 30 was $67,282.28, making a difference of $50,571.31.

The evidence further showed that Golden signed all checks; that he was supposed to do all the depositing of

the money, and all the books were in his custody and under his control.

Many witnesses were called who were members of the Union and testified that they paid the $56.50, but, by comparison with the cash journal in the appellant's handwriting, it was found that these men were listed either at the $26.50 figure, or $31.50, or not listed at all.

FINAL VERDICT IN STATE COURT.

After verdict of jury in Circuit Court of the City of St. Louis, Missouri, assessing defendant's punishment at three years in the State Penitentiary, an appeal was allowed to the Supreme Court of the State of Missouri and its final decision and opinion is cited in 183 S. W. (2d) 109 (Advance Sheet No. 1, December 12, 1944). This decision is lengthy and for sake of brevity is not copied herein.

RESPONDENT'S ANSWER, BRIEF AND ARGUMENT TO PETITIONER'S "QUESTIONS PRESENTED."

The respondent has taken the questions presented by petitioner, under that heading, to this Honorable Court, and has endeavored to answer them in the same numerical order as they appear in petition.

> "Question No. 1. Is the fact that the defendant, Golden, was refused a continuance in view of the showing made of the adverse publicity and the investigations and prejudice on the part of the numerous jury panels called, denied his right of a trial by a fair and impartial jury as guaranteed by the 6th Amendment to the Constitution of the United States."

ANSWER.

Respondent respectfully contends and submits that defendant was not denied his right to a trial by a fair and impartial jury by Court's refusal to grant continuance.

BRIEF.

Counsel for defendant readily concedes that it is well established law; that the granting of a continuance is in the discretion of the Trial Court.

Section 4042, Mo. R. S. A;
State v. Pyle, 343 Mo. 876, 123 S. W. (2d) 166, l. c. 168.

The Trial Court did not abuse its discretion, or was it guilty of gross abuse of discretion, in denying continuance.

State v. Messino, 325 Mo. 743, 30 S. W. (2d) 750, l. c. 758 (and cases cited therein);
State v. Taylor, (Mo.) 8 S. W. (2d) 28, l. c. 31 (also cited by the defendant).

ARGUMENT.

The only question under this point is; was the Trial Court guilty of a *GROSS ABUSE OF DISCRETION* in denying continuance on ground of prejudice of the inhabitants of the County? In cases cited both by petitioner and respondent it is very clear that he did not.

Section 4015, Revised Statutes of Missouri 1939, provides a remedy, namely a change of venue to a different county or circuit when the inhabitants of county where case is pending are so prejudiced against the defendant that a fair trial cannot be had therein. This the defendant

did not avail himself of. It is the contention of respondent that, while the Trial Court did not abuse his discretion, the proper procedure to reach this alleged prejudice would have been through a change of venue. In the Taylor case, cited by both petitioner and respondent, the court in this connection said:

> " * * * It may be well to note here that the charges of local prejudice contained in this application for a continuance would have been more appropriate in an application for a change of venue. * * * "

Respondent therefore respectfully submits that he did have a fair and impartial trial with respect to Question No. 1, as presented by petitioner to this Court.

> "Question No. 2. Does the fact that the State of Missouri used evidence against the defendant, Golden, in the nature of secret reports and hearsay evidence, which the defendant was denied the right to see, violate his right to meet and confront his accusers as guaranteed by the 6th Amendment to the Constitution of the United States.
>
> "Question No. 3. Does the fact that Grand Jury notes were read to the Jury and placed in evidence under the guise of refreshing the memory of the witness and over the objection of the defendant, violate the right of the defendant, Golden, to face his accusers as guaranteed by the 6th Amendment to the Constitution of the United States.
>
> "Question No. 4. Does the fact that the defendant, Golden, was denied by the trial Court the right to cross-examine witnesses in order to show their bias and prejudice or interest in the case, violate his Constitutional rights as provided by the 6th Amendment to the Constitution of the United States."

ANSWER.

These questions can be answered No, for the reason, it is universally the law that a statement or testimony in a previous trial or proceeding of a witness can be used or read to him to refresh his memory, and the control and supervision in examining witnesses lie in the discretion of the Trial Court and will not be disturbed on appeal unless the Trial Court has abused this discretion to the extent of prejudicing the defendant.

BRIEF.

The trial Court's exercise of discretion in examining or controlling the examination of witnesses will not be disturbed, reviewed or revised except for abuse.

24 C. J. S., Criminal Law, Section 1871;
U. S. v. Cotter, C. C. A., N. Y. 60 F. (2d) 689.
Certiorari denied:
Cotter v. U. S., 53 S. Ct. 291, 287 U. S. 666, 77 L. Ed. 575;
State v. Allen, (Mo.) 246 S. W. 946, l. c. 947, par. 7;
State v. Hamilton, 340 Mo. 768, 102 S. W. (2d) 642.

ARGUMENT.

As to questions Nos. 2, 3 and 4, this Court and the Courts of Missouri have repeatedly held that the Trial Court has a large discretion, usually not reviewable, in the examination and cross-examination of witnesses. Respondent submits that the Trial Court in this case exercised a very fair discretion in this matter as to the rights of the petitioner and was not guilty of an abuse of his discretion.

"Question No. 5. Does the fact that the evidence in this cause was wholly insufficient to sustain the in-

dictment, violate the Constitutional right of the defendant under the 14th amendment which guarantees him that he shall not be deprived of his liberty without due process of law."

ANSWER.

This assignment is completely without merit based on the evidence of the shortage of accounts under defendant's supervision, custody and control; his handling of monies of the Union and in the face of his confession.

Defendant contends confession was obtained by trickery. This question is one for the Trial Court and jury to pass on. The jury by its verdict settled this question by undoubtedly believing confession to be voluntary and rendering a verdict of guilty. The trial Court settled the question of law as to the confession being voluntary by admitting it in evidence.

BRIEF.

Whether statements of defendant were voluntary is a question for jury.

State v. Cole, (Mo.) 174 S. W. (2d) 172, l. c. 173 (and a long line of cases cited therein).

The requirement of "Due Process" is met where, in proceedings affecting all persons alike, a person is presented by indictment in a court of competent jurisdiction for the commission of an offense under a law not, in itself, repugnant to the Federal Constitution, and tried in such court according to the rules applicable to proceedings in that jurisdiction in the course of an orderly administration

thereof after opportunity is presented for hearing and defense.

United States ex rel. Mason v. Hunt, 16 Fed. Supp., 285, l. c. 288, par. 7;

Frank V. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969.

(Note: The Mason and Mangum cases cited herein seem to answer *negatively* all the questions presented by petitioner to this Court.)

ARGUMENT.

There is an abundance of competent evidence touching defendant's guilt, and under the law the Trial Court did not violate defendant's constitutional rights in submitting this cause to a jury for its determination.

"Question No. 6. Does the fact that the indictment in this cause was vague, indefinite, uncertain, verbose and duplicious and failed to properly inform the defendant of the charges which he was called upon to meet, deny the defendant his right under the Constitution to be informed of the charges against him."

ANSWER.

The indictment does not violate the defendant's constitutional rights in that it does inform the defendant of the charges he shall meet and does conform and follow the language of the statute under which the charge is brought.

BRIEF.

Embezzlement by officer.

Section 4478, R. S. Mo. 1939.

Indictment, when not deemed invalid—For surplusage, or repugnant matter where there is sufficient matter alleged to *indicate* the *crime* and person charged.

Section 3952, R. S. Mo. 1939.

ARGUMENT.

The defendant complains of the indictment for the reason that it is lengthy and verbose. The crime charged by this indictment under the statute, or rather the acts of the crime, were lengthy, complicated and covered a long period of time, and were committed in such a way as to prevent detection and confuse any person attempting to learn the true facts.

The crime charged was one of great magnitude and scope and necessarily required an indictment covering same to be lengthy in order to set out and inform the defendant of what he was charged.

This cause was not a simple case of a man reaching in the cash drawer and embezzling a handful of money, but a series of acts of taking money and falsifying records.

The defendant would have a great deal more merit in this contention if the indictment had not set out the entire transaction.

This indictment follows the statute, charging embezzlement and informing defendant in detail as to the charges therein. Respondent submits that there is no merit to petitioner's complaint as to this indictment.

"Question No. 7. Does the fact Circuit Attorney, Morris, did everything he could to arouse the public against this defendant including making statements to the newspapers, investigating the jury system, appearing before the jury commissioners, writing letters to members of the Union, using unfair trial tactics, and doing

everything possible to obtain a conviction in this case, regardless of how it was accomplished, deny the defendant a fair and impartial trial as provided by the Constitutions of the United States and the State of Missouri."

ANSWER.

The first part of this question is answered under question No. 1, as to actions of prosecuting attorney outside the courtroom, newspaper articles and publicity affecting the jury panel, and in the opinion of the writer need no further discussion under this point. The respondent denies that the prosecuting attorney was guilty of, quoting petitioner, "Using unfair trial tactics, and doing everything possible to obtain a conviction in this case, regardless of how it was accomplished." Petitioner has not shown that Trial Court abused its discretion in controlling argument and conduct of counsel.

BRIEF.

Unless there has been a *prejudicial* abuse of discretion, the Appellate Court will not disturb the Trial Court's exercise of discretion in controlling the character and scope of the arguments and the conduct of counsel.

24 C. J. S., Criminal Law, Sec. 1873;
State v. Marshall, 317 Mo. 113, 297 S. W. 63, l. c. 69.

Same rule as to measures and steps to be taken in consequence of improper argument or misconduct.

State v. Bushong, (Mo) 246 S. W. 919;
State v. Finkelstein, (Mo) 213 S. W. 465;
Windon v. State, 93 So. 79, 18 Ala. App. 430;
Ex parte Windon (Certiorari Denied), 93 So. 924, 208 Ala. 701.

ARGUMENT.

Petitioner's prayer to have this question reviewed by this Honorable Court is not supported either by the record or by the law. These matters were ruled on by the Trial Court in the exercise of his discretion, and the petitioner has not shown any prejudicial abuse of that discretion, which would or could be said to have violated his constitutional rights under the Federal Constitution.

Petitioner's claim of bias and prejudice of the prosecuting attorney is without merit in the judgment of the writer, and his actions were only those of any qualified prosecuting attorney who was mindful of his oath and duties as a representative of the people of the State of Missouri. He was vigorous and uncompromising in the discharge of duties in the prosecution of a serious offense committed by defendants in a position of trust among their fellow workers, and should be commended, rather than criticized.

CONCLUSION.

Petitioner, under the heading of REASONS FOR GRANTING THE WRIT, contends the affirmance of the jury's verdict by the Supreme Court of the State of Missouri deprived this defendant of his liberty without due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

Respondent has, without taking advantage of any legal technicalities or rules, endeavored to clearly show this Honorable Court the defendant was accorded a fair and impartial trial, and was not denied any of his rights under either the Constitution of the State of Missouri or

of the United States, or deprived of his liberty without due process of law.

Wherefore, respondent earnestly contends that a Writ of Certiorari should not be issued by this Honorable Court, and that the petition should be dismissed and Writ of Certiorari denied.

Respectfully submitted,

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Assistant Attorney General,
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v